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IN THE

Supreme Court of the United States

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October Term, 1973
No. 73-1167

KEN FOSTER COMPANY, INC., a corporation,

Petitioner,

vs.

CHRYSLER LEASING CORPORATION, AVIS RENT-A-CAR SYSTEM, INC.,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari.

G. WILLIAM SHEA,
FRANKLIN H. WILSON,
JOHN M. ROCHEFORT,
3435 Wilshire Boulevard,
Los Angeles, Calif. 90010,

KEITH A. JENKINS,
P.O. Box 1919,
Detroit, Michigan 48231,
Attorneys for Respondent Chrysler Leasing Corporation.

MAXWELL M. BLECHER,
612 South Flower Street,
Los Angeles, Calif. 90017,
Attorney for Respondent Avis Rent-A-Car System, Inc.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Respondents.

Brief in Opposition to Petition for Writ of Certiorari.

Introduction.

Respondents Chrysler Leasing Corporation (Chrysler) and Avis Rent-A-Car System, Inc. (Avis) submit this brief in opposition to the petition of Ken Foster Company, Inc. (Foster) for a writ of certiorari.

Foster leased cars from Chrysler for use in its car rental business. On December 30, 1969, Foster commenced this lawsuit. Foster claims it was in competition with Avis and that Chrysler granted brokerage commissions to Avis not granted to Foster and that Chrysler conspired with Avis in restraint of trade.

Foster's first amended complaint sets forth five causes of action. The first cause of action alleges a violation of Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13(c). The fifth cause of action alleges the same claim under a similar California statute. Respondents' motion to dismiss the

first and fifth causes of action on the grounds that they failed to state a claim for relief because the Robinson-Patman Act applies only to sales, not leases, was granted on June 5, 1970.[1] (At that time Foster stipulated to the dismissal of the fourth cause of action.)

Issue was joined on the second cause of action, which alleges a conspiracy in restraint of trade between Chrysler and Avis in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and the third cause of action, which alleges the same violation under a similar California statute. Extended discovery followed, including three days of deposition of petitioner's president. Following the conclusion of the deposition, respondents moved for summary judgment on the ground the deposition showed there were no triable issues of fact. Petitioner opposed the motion and made several theoretical offers of proof. However, petitioner filed no affidavits and presented no factual opposition to the motion for summary judgment. It was granted on July 20, 1971.[2]

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[1]Petitioner did not, either at the hearing on the motion to dismiss or in the subsequent discovery and summary judgment proceedings, present any facts indicating that the leases were anything other than bona fide leases. As the Ninth Circuit observed in its affirmance of the District Court:

> "The lease device employed in this case does not resemble a sale so closely as to require a trial to test the reality of the transaction as a lease." [Petition, p. 2a.]

[2]Petitioner states that it is appealing from the judgments dated June 5, 1970, and July 20, 1971. An appeal from these judgments was taken to the Ninth Circuit but the appeal was dismissed on September 5, 1973, because a counterclaim by Chrysler was pending in the District Court (and is still pending). The Ninth Circuit's order of dismissal suggested that the parties obtain from the District Court the statement contemplated by 28 U.S.C. § 1292(b). A new order including such statement was entered on September 17, 1973. The record was immediately returned to the Court of Appeals, and the Ninth Circuit affirmed the September 17, 1973, judgment on November 6, 1973. The September 5, 1973, order of dismissal by the Ninth Circuit ap-

ARGUMENT.

The principal question presented for review by the petition concerns the interpretation and application of the Robinson-Patman Act (hereinafter sometimes referred to as the "Act"). The petition also contains two secondary questions which concern the interpretation and application of the Sherman Act. None of the three questions presents issues of such special importance (as measured by the guidelines set down by Rule 19 of the Supreme Court Rules) to warrant the Court to exercise its discretionary authority to issue a writ of certiorari to review the decisions and orders of the lower courts.

Foster's major proposition is that the so-called "brokers" provision of the Robinson-Patman Act, 15 U.S.C. § 13(c), should be extended to include lessor/lessee transactions notwithstanding a long, clear and unchallenged line of case authority to the contrary which authority is based on the legislative history of the Act.

Congress intentionally limited the scope of the Robinson-Patman Act to sale transactions. The Act was passed in 1936 as a replacement of the original Section 2 of the Clayton Act. While the language of Section 2 of the Clayton Act applied only to sale transactions, Section 3 of the Clayton Act (covering tying arrangements) dealt with both sales and leases. In addition, as early as 1920 the courts had established that Section 2 of the Clayton Act was limited to sale transactions. *United States v. United Shoe Machinery Co.*, 264 Fed. 138 (E.D.Mo. 1920), aff'd, 258 U.S. 451 (1922). At a time when Congress was faced with the

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pears at Appendix A to this Brief and the September 17, 1973, judgment of the District Court appears at Appendix B to this Brief.

dichotomy in scope between Sections 2 and 3 of the Clayton Act, Congress chose to retain the purchase/sale terminology in the newly enacted Robinson-Patman Act.

The foregoing rule has been judicially carried forward to the present to deny recovery under the Act for a number of arrangements which might otherwise constitute unlawful discrimination in pricing but for the "non-sale" characteristics of the challenged transaction. *Students Book Co. v. Washington Law Book Co.*, 232 F.2d 49 (D.C. Cir. 1955) cert. denied, 350 U.S. 988 (1956) [consignment]; *Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center*, 219 F.Supp. 400 (W.D.Pa. 1963) [lease] and *County Theatre Co. v. Paramount Film Distributing Corp.*, 146 F.Supp. 933 (E.D.Pa. 1956) [license].

Therefore, contrary to Foster's self-serving recitation that the "major" question which it submits is both novel and of paramount significance to the antitrust laws [Petition, p. 1], the true purpose of the petition is to have the Court reverse a long line of well-settled case authority. However, such a reversal by way of departure from the clear language of the Act as properly interpreted by the courts should come, if at all, from Congress and not the Court.

Foster's standing to raise its two secondary questions concerning the application of the Sherman Act is even more suspect than the portion of the petition devoted to the Robinson-Patman Act. The Robinson-Patman Act allegations were disposed of by way of a Federal Rule of Civil Procedure 12(b) order of dismissal. The Sherman Act allegations were subsequently dispensed with in the district court by an order for summary judgment.

Chrysler and Avis noticed and took the deposition on oral examination of Foster's president. Based upon the total inability of the deponent to provide factual support for Foster's claims under the Sherman Act, Chrysler and Avis moved for summary judgment. Relying entirely upon the allegations contained in its pleadings, *Foster submitted no independent competent evidence in opposition to the summary judgment motion.*

Foster's failure to present any factual showing in opposition to the motion for summary judgment on the Sherman Act and related claims precludes Foster from urging upon this Court facts which it "believed it could show," in the district court [Petition, p. 11].

Conclusion.

Based upon Foster's inability to show that its case falls within the guidelines established by Rule 19 of the Supreme Court Rules or that the case is otherwise of special significance the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

G. WILLIAM SHEA,
FRANKLIN H. WILSON,
JOHN M. ROCHEFORT,
and
KEITH A. JENKINS,
Attorneys for Respondent Chrysler Leasing Corporation.

MAXWELL M. BLECHER,
Attorney for Respondent Avis Rent-A-Car System, Inc.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Ken Foster Company, Inc., *Appellant,* vs. Chrysler Leasing Corporation, Avis Rent-A-Car System, Inc. and Doe 1 through Doe 2,000 inclusive, *Appellees.* No. 71-2408.

[September 5, 1973].

Appeal from the United States District Court for the Northern District of California.

Before: TUTTLE, TRASK and GOODWIN, Circuit Judges.

ORDER

It appearing that the district court neither disposed of the defendant's counterclaim nor certified the dismissals of counts one and five and the summary judgments on counts two and three, the district court's order is not a final judgment from which an appeal may be taken. Fed. R. Civ. P. 54(b). *See Illinois Tool Works, Inc. v. Brunsing,* 378 F.2d 234 (9th Cir. 1967).

On remand the appellants may request that the district court dispose of the counterclaim or make the statement contempated by 28 U.S.C. § 1292 (b) and, if the appeal is perfected, the cause will be submitted to the panel which heard the oral argument. The appeal, if any, will be decided upon the present record and briefs without further oral argument.

The appeal is dismissed.

APPENDIX B.

Amended Order Dismissing First, Fourth and Fifth Causes of Action and Granting Defendants' Motion for Summary Judgment on the Second and Third Causes of Action of First Amended Complaint and Certification for Appeal Pursuant to 28 U.S.C. § 1292(b).

United States District Court, Northern District of California.

Ken Foster Company, Inc., a corporation, Plaintiff, v. Chrysler Leasing Corporation, a corporation, Avis Rent-A-Car System, Inc., a corporation, Defendants.

Chrysler Leasing Corporation, a corporation, Counter-Claimant, v. Ken Foster Company, Inc., a corporation, and Kenneth G. Foster Jr., an individual, Counter-Defendants. No. 69-664-RHS.

Defendants CHRYSLER LEASING CORPORATION and AVIS RENT-A-CAR SYSTEM, INC. moved, pursuant to Fed.R.Civ.P. 12(b)(6) to dismiss the first, fourth and fifth causes of action of the first amended complaint upon the ground that each does not state a claim upon which relief can be granted. The court finds that the first, fourth and fifth causes of action of the first amended complaint, and each of them, do not state a claim upon which relief can be granted; and

Defendants also moved, pursuant to Fed.R.Civ.P. 56 (b), for an order of summary judgment on the second and third causes of the first amended complaint upon the ground that there is no genuine issue as to any material fact as to the second and third causes of the first amended complaint and that defendants are entitled to judgment as a matter of law on said causes.

After a full consideration of the pleadings, depositions and all other papers on file and oral agrument, the court finds that there exists no genuine issue as to any material fact as to the second and third causes of the first amended complaint and defendants are entitled to judgment on said causes as a matter of law.

NOW, THEREFORE:

IT IS ORDERED that the first, fourth and fifth causes of action in the first amended complaint are dismissed with prejudice and without leave to amend.

The plaintiff has stipulated to the dismissal of the fourth cause of action. The first cause of action does not state a claim on which relief can be granted because it is based upon the Robinson-Patman Act, 15 U.S.C. § 13, and the Robinson-Patman Act does not apply to leases.

The fifth cause of action does not state a claim upon which relief can be granted because it is based upon a provision of the California Unfair Practices Act, California Business & Professions Code § 17045, and that act and that section do not apply to vertical, as opposed to horizontal, injuries. In addition, that section does not apply to leases.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the motion of defendants Chrysler Leasing Corporation and Avis Rent-A-Car System, Inc. for summary judgment on the second and third causes of the first amended complaint are [sic] granted.

THE COURT IS OF THE FURTHER OPINION that its order involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order

may materially advance the ultimate termination of the litigation.

IT IS FURTHER ORDERED that proceedings in this court shall be stayed until the appeal from this order has been finally concluded.

Dated: September 17, 1973.

ROBERT H. SCHNACKE
United States District Judge